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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN CHEVELLE BROWN,

Defendant and Appellant.

E070136

(Super.Ct.Nos. FSB17002686 &  
FSB17002745)

OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith S. White and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Kevin Chevelle Brown guilty of two counts of second degree robbery (Pen. Code,<sup>1</sup> § 211, counts 1 & 3), second degree burglary of a vehicle (§ 459, count 2), and assault with a deadly weapon (§ 245, subd. (a)(1), count 4). It also found that defendant personally used a dangerous and deadly weapon in the commission of counts 1 and 3. (§ 12022, subd. (b)(1).) Defendant admitted he had served four prior prison terms. (§ 667.5, subd. (b).) A trial court sentenced him to a total of 11 years four months in state prison.

On appeal, defendant contends that: (1) the trial court prejudicially erred in consolidating his two cases (case Nos. FSB17002686 and FSB17002745); and (2) there was insufficient evidence to support the conviction for robbery in count 3. We affirm.

### FACTUAL BACKGROUND

#### *July 2, 2017 Robbery (Case No. FSB17002686)*

Jim P. owned a few businesses located at 1014 North D Street in San Bernardino (Jim P.'s property). He knew defendant, who used to come to his property almost every night, at 2:00 a.m. or 3:00 a.m. Defendant was known by the nickname, Cheerio.

James G. resided in a rented room on Jim P.'s property. On July 2, 2017, James G. parked his car in front of his residence, locked it, and went inside his home. At approximately 1:00 a.m., a female who stayed in a camper outside the residence yelled that Cheerio was breaking into James G.'s car. James G. came outside and saw a male,

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

who was later identified as defendant, closing one of the doors on the driver's side. A female was at the front of the car trying to open the hood. James G. approached defendant and asked him what he was doing. Defendant responded, "I'm taking your s - - -." James G. said, "Not today." James G. picked up a metal bar on the porch and started walking toward defendant. He then swung the metal rod at defendant but missed. Defendant pulled out a knife from his belt loop and threatened to stab James G. James G. started backing away toward his residence and threw the rod at him. Defendant kept advancing toward him, and James G. backed up into his residence and started grabbing items off the desk by the door and throwing them at defendant. James G.'s wife tried to pepper spray him, but the spray clogged up. They then shut the door.

When James G. later came out to see the damage to his car, he noticed his backpack was missing. He owned a computer repair company, and the backpack contained brand new iPads and iPhones. His wife called the police immediately. A few days after the incident, the police called him for an interview. A police detective showed him a photo lineup, and James G. identified defendant as the perpetrator.

At trial, James G. said he saw defendant with his backpack on. He also said defendant had a curly wig on. James G. testified he had personally interacted with defendant, who had used his computer repair service about three times. James G. identified defendant in court.

*July 9, 2017 Robbery (Case No. FSB17002745)*

On July 9, 2017, Kevin S. was staying on Jim P.'s property. His arrangement with Jim P. was that he helped clean up the area and pick up trash, and in return, he stayed there "from time to time." At trial, Kevin S. testified that Jim P. told him to be the "eyes and ears of [his property]" when he left at night. Kevin S. did not get paid money, but assumed Jim P. paid him by letting him stay there.

At around 1:00 a.m., Kevin S. was in a camper when he heard a commotion. He went outside and saw defendant holding an air compressor that belonged to Jim P. in one hand and a gun in the other. Kevin S. had seen defendant in the area regularly and knew him as Cheerio. He confronted defendant, grabbed the air compressor, and said, "No, this is not going to happen." Defendant smacked him in the face with the gun. Kevin S. let the compressor go, grabbed his jaw, which was bleeding, and fell back. He went back to his camper and called Jim P. Jim P. came and took pictures of his face and reported the incident to the police. The police interviewed Kevin S. and later asked him to come to another location to do an in-field lineup. He identified defendant as the perpetrator.

At trial, Kevin S. was asked if he had a criminal history, and he said he had several felony convictions. Jim P. testified that Kevin S. worked for him, picking up trash and maintaining his property. He said he paid Kevin S. some money, fed him, and allowed him to stay overnight on his property, in exchange for his work. He testified that when Kevin S. stayed overnight, he also "perform[ed] security."

## ANALYSIS

### I. The Trial Court Properly Consolidated the Cases

Defendant claims the trial court improperly consolidated case Nos. FSB17002686 (the first case) and FSB17002745 (the second case), since the robberies from both cases were committed at different times and involved different victims, and the cases alleged different additional counts. Defendant also argues the consolidation prejudiced him and denied him a fair trial, since it joined together two weak cases and encouraged the jury to convict him based on “his perceived overall conduct.” We disagree.

#### *A. Motion to Consolidate*

On July 13, 2017, the prosecution filed a felony complaint in the first case, charging defendant with second degree robbery (§ 211, count 1), assault with a deadly weapon (§ 245, subd. (a)(1), count 2), and second degree burglary of an automobile (§ 459, count 3). These charges arose from the incident that occurred on July 2, 2017. The prosecution subsequently filed an information alleging just second degree robbery and second degree burglary of an automobile.

On July 20, 2017, the prosecution filed a felony complaint in the second case, charging defendant with second degree robbery (§ 211, count 1) and assault with a deadly weapon (§ 245, subd. (a)(1), count 2). The complaint arose from the incident that occurred on July 9, 2017.

On December 13, 2017, the People filed a motion to consolidate the two cases, pursuant to section 954. The People argued that the cases contained different offenses of

the same class and asserted that defendant used a deadly weapon to rob the victims in both cases. The People further pointed out that the two incidents were close in time and occurred at the same location.

The People also contended the court should consolidate the cases under section 954 because they were offenses “connected together in their commission,” since they shared common elements of substantial importance. The People argued that the incidents in each case occurred at the same location and involved the use of a weapon.

In addition, the People contended the consolidation of the two cases would not prejudice defendant. They argued that none of the charges in either case was sufficiently more inflammatory than the other so as to constitute prejudice, the two cases were equal in strength of evidence, and none of the charges involved the death penalty. (See *People v. Hill* (1995) 34 Cal.App.4th 727, 735.)

The court held a hearing on the motion on December 14, 2017. Defense counsel argued that the cases should not be joined because there was no common element of substantial importance except the location, and the two cases were very different. He further contended that this was an attempt to join two very weak cases “to get that spillover effect,” and defendant would be denied his right to a fair trial and due process. He argued that the identification of defendant was doubtful because both victims had prior criminal histories, making their credibility questionable. The prosecutor responded by arguing that both cases involved robberies committed with weapons. After hearing argument from counsel, the court stated that the credibility of the victims was not an

issue, since crime victims commonly had prior criminal records. As to joinder, the court found that the robberies in both cases were clearly of the same class, the cases were of equal strength, and “there [was] no bootstrapping of a strong case holding up a weak case.” The court further found no good cause to sever under section 954. Thus, it granted the motion to consolidate.

*B. The Court Properly Granted the Motion*

Section 954 provides that “[a]n accusatory pleading may charge two or more different offenses *connected together in their commission*, . . . or two or more different offenses *of the same class of crimes or offenses*, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.” (Italics added.) The statute also provides that “the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.” (*Ibid.*) In other words, “[t]he determination that the offenses are “joinable” under section 954 is only the first stage of analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts “in the interest of justice and for good cause shown.” ’ ’ ( *People v. Lucky* (1988) 45 Cal.3d 259, 276-277 (*Lucky*).) “Joinder is ordinarily *avored* because it avoids the increased expenditures of funds and judicial resources that may result from separate trials.” ( *People v. Simon* (2016) 1 Cal.5th 98, 122, italics added.)

A motion for joinder is directed to the discretion of the trial court. (*People v. Morgan* (1955) 134 Cal.App.2d 97, 98, fn. 6.) Where the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish an abuse of discretion. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160 (*Mendoza*).) “In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. [Citation.] The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.” (*Id.* at p. 161.)

Here, the statutory requirements for joinder under section 954 were satisfied because the offenses were “of the same class of crimes” and were “connected together in their commission.” (§ 954.) The second degree robbery and second degree burglary of a vehicle belong to the same class of crimes—theft. In addition, robbery and assault with a deadly weapon charges are offenses of the same class—assaultive crimes against the person. (See *People v. Poggi* (1988) 45 Cal.3d 306, 314, 320 (*Poggi*) [court found robbery, burglary, and assault with a deadly weapon were properly joined].) We note defendant’s contention that “it is not enough that the offenses are of the same general classification, i.e., crimes against the person, property, or public welfare.” However, the



offenses here were not just of the same general class of crimes; they were specifically assaultive crimes and theft crimes. (See *ante*.)

The offenses were also “connected together in their commission.” “[O]ffenses which are committed at different times and places against different victims are nevertheless ‘connected together in their commission’ when they are, as here, linked by a ‘common element of substantial importance.’ ” (*Lucky, supra*, 45 Cal.3d at p. 276.) The common elements here included the intent to feloniously obtain property and the use of weapons. In the first case, defendant broke into a car to steal some items, and he used a knife to facilitate the theft. In the second case, defendant was stealing an air compressor when the victim confronted him; so, defendant assaulted the victim with a gun, in order to facilitate the theft. (See *People v. Conrad* (1973) 31 Cal.App.3d 308, 315 [“Here the element of intent to feloniously obtain property runs like a single thread through the various offenses, . . .”].) We further note the common elements of the occurrence of the two incidents at the same location, and the occurrence of the incidents at approximately the same time (1:00 a.m.).

Defendant contends the elements required for joinder were not met because the incidents occurred at different times and involved different victims, different weapons, and different stolen items. He further points out that the July 2 incident involved an accomplice, an alleged disguise, and one count of vehicle burglary, whereas the July 9 incident did not. However, since the statutory requirements under section 954 were met here, the court properly joined the cases, despite the differences in the specific facts of

each case. (§ 954; see *People v. Feigelman* (1924) 65 Cal.App. 319, 320 [court did not abuse its discretion in consolidating two cases charging the commission of grand larceny against two different victims, more than one year apart].)

“Since the statutory requirements for joinder were met in the present case, appellant can establish error only on a clear showing of prejudice.” (*Lucky, supra*, 45 Cal.3d at p. 277; see *Mendoza, supra*, 24 Cal.4th at p. 160.) Defendant contends the evidence of the charged crimes was not cross-admissible in separate trials. The People argue that the evidence was cross-admissible to show common plan and intent, under Evidence Code section 1101. They assert that both crimes occurred at the same address at 1:00 a.m., one week apart, and defendant used a weapon in both. However, we are not certain the two incidents “share marks so distinct in number and significance that they logically tend to isolate the same person as the perpetrator of both.” (*People v. Balderas* (1985) 41 Cal.3d 144, 172, superseded by statute on other grounds as stated in *People v. Martin* (1998) 64 Cal.App.4th 378.) In any event, “the absence of cross-admissibility does not by itself demonstrate prejudice.” (*Mendoza, supra*, 24 Cal.4th at p. 161.)

We next turn to the three other factors considered in prejudice—“likelihood to unduly inflame; bolstering of a weak case with a strong one; and conversion of charges into a capital offense.” (*People v. Soper* (2009) 45 Cal.4th 759, 780.) Then, we will proceed to weigh those factors against the benefits to the state of joinder. (*Ibid.*) The robberies at issue in these two cases are similar in nature. Defendant attempted to steal items and used weapons to facilitate the thefts. Thus, neither incident, when compared to

the other, was likely to unduly inflame a jury against defendant. “Nor is this a situation in which either charge is a capital offense, or in which the prosecutor sought joinder in order to convert the matter into a capital case.” (*Ibid.*)

Defendant primarily argues that both cases were weak, and the joinder of the counts “allowed the prosecution to improperly use each case to bolster the other.” In other words, the “spillover effect” of a joint trial unfairly altered the outcome of one or both of the cases. Defendant emphasizes that the credibility of the victims was questionable, pointing out that James G. was on probation, conceded he smoked marijuana on the day of the incident, said defendant was wearing a wig, which was never recovered, and initially hesitated in identifying defendant at trial. Furthermore, Kevin S. admitted having substance abuse issues and initially failed to identify defendant as the perpetrator during the initial identification. Defendant also points out that the stolen items and the weapons used in both cases were not recovered.<sup>2</sup>

We conclude that this is not an instance where a weak case was joined with another weak case. In each case, the victim positively identified defendant at the time of the incident, as well as at trial. As to the credibility of the victims, “ ‘it is the exclusive province of the trial judge or jury to determine the credibility of a witness . . . .’ ” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) James G. admitted that he was in custody at the time of trial, he was on probation, and he had a few felony convictions and

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<sup>2</sup> We note that the trial came down to the credibility of the victims. Thus, the lack of recovery of the stolen items, wig, and weapons was immaterial. In other words, the recovery of those items was not necessary to convict defendant.

a misdemeanor conviction. Kevin S. admitted that he also had prior felony convictions. Thus, the jurors were aware of the witnesses' criminal backgrounds. Nonetheless, they believed their testimonies, as evidenced by the guilty verdicts. “ ‘[W]e must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder.’ ” (*Ibid.*)

In any event, we note James G.'s testimony that he had interacted with defendant five or six times and was familiar with his voice. He also said he was confident when he pointed out defendant as the perpetrator in the photo identification. In court, when asked to confirm that defendant was the person who broke into his car and pulled a knife on him, James G. initially said he did not know. He clarified that he did not know if he wanted to answer, and he did not know if it was defendant. However, when the prosecutor reminded him that he had been given use immunity for his testimony and that he took an oath under penalty of perjury to tell the jury the truth, James G. confirmed that defendant was the perpetrator. Regarding his marijuana use, James G. explained that he had a prescription for marijuana to treat migraine headaches, and he only smoked half a blunt (cigar) on the night his car was broken into. He said he smoked that night at around 10:00 p.m., so he was not high when the incident occurred at 1:00 a.m.

As to Kevin S., we observe that he testified he was taken to a location and sat in the police car when he did the in-person identification. He explained that he initially was not sure if defendant was the perpetrator because the sun was in his eyes; he repositioned himself to get a better look. He then positively identified defendant. Furthermore, he

testified he had personally known defendant for months at the time of the robbery and assault, and he positively identified defendant in court again.

We additionally note that the benefits to the state of joinder were significant. “Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process. These considerations outweigh the minimal likelihood of prejudice through joinder of the charges in this case.” (*People v. Bean* (1988) 46 Cal.3d 919, 939-940.)

We conclude that defendant has not shown clear or substantial prejudice from the joinder of the two sets of charges. Moreover, there was no good cause shown for severance. Accordingly, the court did not abuse its discretion in denying his motion to consolidate.

## II. There Was Sufficient Evidence to Support the Robbery Conviction in Count 3

Defendant argues that his conviction for robbery arising out of the July 9, 2017 incident should be reversed. He claims Kevin S. was not a victim of the robbery, since he did not have constructive possession of the air compressor, which belonged to Jim P. Defendant asserts that Kevin S. was not an employee of Jim P. and did not have a special

relationship with him, such that he had the authority or responsibility to protect his property. We conclude the evidence was sufficient.

*A. Background*

At the close of evidence, defendant moved to dismiss the robbery in count 3, pursuant to section 1118.1, on the ground that the alleged victim did not have constructive possession of the air compressor and could not be considered a victim of the robbery. He argued that Kevin S. was not an employee of Jim P., so there was no special relationship, which was necessary to make him a victim of the robbery. The court reviewed the motion and heard argument from counsel. It then found that Kevin S. was “the eyes and ears of the place,” noting that when something bad happened, he would call Jim P. to report it, like an employee would call a manager if a Pizza Hut was robbed. The court found that he not only had access and possession of various property, he was held out to be an authority of the property when the owner was not there. The court noted that Jim P. acted accordingly when he took pictures of Kevin S. and called the police. Jim P. also turned over the photographs to the police, such as an authority figure would do for one’s employee. The court specifically noted his testimony that Kevin S.’s duties included picking up trash and security at night, when he was not there. Therefore, the court denied the motion to dismiss.

*B. Relevant Law*

“The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate

court in reviewing the sufficiency of the evidence to support a conviction, that is, whether from the evidence including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.” (*People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656.)

“On appeal, we ‘must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom.” (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064 (*Ugalino*).)

### *C. The Evidence Was Sufficient*

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) “California follows ‘the traditional approach that limits victims of robbery to those persons in either actual or constructive possession of the property taken.’ [Citation.] ‘“Robbery is an offense against the person . . . .” ’ [Citation.] Accordingly, a victim can be any person who shares ‘some type of “special relationship” with the owner of the property sufficient to demonstrate that the victim had authority or responsibility to protect the stolen property on behalf of the owner.’ [Citation.] Persons with just such a special relationship include business employees and parents living with their adult children.” (*Ugalino, supra*, 174 Cal.App.4th at pp. 1064-1065.)

In *People v. Moore* (1970) 4 Cal.App.3d 668 (*Moore*), the defendant entered a business establishment, which was attended by two young girls. He produced a gun and said, “ ‘This is a stick-up. Give me the money.’ ” (*Id.* at p. 670.) One of the girls’ mothers (the mother) entered the store during the holdup and “at defendant’s insistence, removed money from the cash register and from a money bag and gave it to [him].” (*Ibid.*) The defendant was charged with robbery, and the mother was named as the victim. He was found guilty. (*Id.* at p. 669.) On appeal, the defendant argued that the evidence did not support the robbery conviction, since the mother was not an employee, but merely a visitor. (*Ibid.*) However, the court held that a robbery victim need not be the true owner of the property taken, and once the mother “exercised dominion over the money, whatever her motivation in so doing, she became, insofar as [the] defendant was concerned, the person in possession thereof, and she was properly designated in the information as the immediate victim of his robbery.” (*Id.* at pp. 670-671.) Thus, the court affirmed the conviction. (*Id.* at p. 671.)

Here, there was substantial evidence to support the finding that Kevin S. was a victim within the meaning of the robbery statute because he had constructive control of Jim P.’s property. Kevin S. testified that he stayed on the property, in exchange for helping clean up and picking up trash on the property. He said Jim P. told him he was the “eyes and ears of [his property]” when he (Jim P.) went home at night. Similarly, Jim P. testified that Kevin S. “worked for [him]” “picking up trash and maintaining the property.” He said he paid Kevin S. a little money, but essentially allowed him to stay on



his property, in exchange for his services. Jim P. confirmed that when he was not on the property, Kevin S. had “full control over both the building and everything in it.” He also confirmed on cross-examination that Kevin S.’s duties included keeping the property clean, going with him to pick up junk and bring it back, and “perform[ing] security.” When asked what his “duties as security” were, Jim P. said that if Kevin S. saw someone doing something or taking something they were not supposed to, he was to tell them not to.

Furthermore, the “special relationship” Kevin S. shared with Jim P. was supported by his actions during and after the robbery. When he heard a commotion outside and saw defendant holding the air compressor, he confronted him, in order to stop him from stealing Jim P.’s property. Kevin S. grabbed the air compressor, and said, “No, this is not going to happen.” After defendant hit him with the gun, he let go. He went to his camper and called Jim P. In other words, Kevin S. acted to protect the owner’s property, in accordance with his duty.

In support of his argument that Kevin S. did not constructively possess the air compressor, since he did not have a “special relationship” with Jim P., defendant cites *Ugalino, supra*, 174 Cal.App.4th 1060. However, *Ugalino* is distinguishable. In that case, Joshua Johnson and Jessie Rider shared an apartment. (*Id.* at p. 1062.) The defendant and his accomplice entered the apartment on the pretense of buying marijuana from Johnson. Once inside, the defendant drew a gun on Johnson, and the defendant announced, “ ‘[Y]ou’re getting jacked.’ ” The defendant’s accomplice pointed his gun at

Rider, telling him to lie face down on the ground. (*Id.* at pp. 1062-1063.) Johnson stuffed the drugs he was holding into his pants and fled the apartment. The defendant and his accomplice also ran out of the apartment. (*Id.* at p. 1063.) A jury found the defendant guilty on several counts, including the attempted robbery of Rider. (*Id.* at p. 1063.)

The appellate court reversed the conviction, noting that “Rider did not have actual possession of the marijuana, and Johnson stored the marijuana locked in a safe in his bedroom.” (*Ugalino, supra*, 174 Cal.App.4th at p. 1065.) Rider did not have access to the safe and did not even have a key to the apartment. (*Ibid.*) Moreover, the court stated that Rider and Johnson were just roommates; thus, Rider had no obligation to protect Johnson’s belongings. (*Ibid.*) In addition, Johnson was present to protect his own property during the robbery, and there was no evidence he expected Rider to assist him in that regard. (*Ibid.*)

Unlike the instant case, there was no “special relationship” between the owner of the stolen property and his roommate in *Ugalino, supra*, 174 Cal.App.4th 1060. The roommate did not have his own key to the apartment and had no obligation to protect the owner’s property. (*Id.* at p. 1065.) In contrast, here, Jim P. gave Kevin S. duties to perform, in exchange for a place to stay, and Kevin S. had full control over the property when Jim P. was away at night. Moreover, Kevin S. exercised dominion over the air compressor when defendant tried to steal it; thus, he became “the person in possession thereof” and was properly the victim of the robbery. (*Moore, supra*, 4 Cal.App.3d at

pp. 670-671; see *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143 [“For the purposes of robbery, it is enough that the person presently has some loose custody over the property, is currently exercising dominion over it, or at least may be said to represent or stand in the shoes of the true owner.”].)

Viewing the record in the light most favorable to the judgment, as we must, we conclude that there was substantial evidence to support the finding that Kevin S. was a victim within the meaning of the robbery statute.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER  
Acting P. J.

We concur:

MILLER  
J.

RAPHAEL  
J.